

FILED  
CRIMINAL

VIRGINIA:

03 MAY 23 PM 4: 28

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA )

v. )

LEE BOYD MALVO )

CLERK OF CIRCUIT COURT  
FAIRFAX, VA

CRIMINAL NO. 102888

**COMMONWEALTH RESPONSE TO DEFENDANT'S MOTION TO  
DISMISS INDICTMENT PURSUANT TO VA CODE § 19.2-294**

**The provisions of Va. Code § 19.2-294 are inapplicable in this case because  
Malvo is charged with offenses involving acts of terrorism.**

Malvo's assertion that the Indictment in this case must be dismissed pursuant to Va. Code §19.2-294 is flawed at the outset because the very language of that statute exempts "any offense involving an act of terrorism as defined in Va. Code §18.2- 46.4." The Defendant, (hereinafter Malvo), is charged in Count I of the Indictment with committing the murder of Linda Franklin while engaged in the commission of an act of terrorism under Va. Code §18.2-46.4. Therefore, Va. Code §19.2-294 is inapplicable, to Count I and presents no bar to the prosecution of Malvo for the murder of Linda Franklin under Va. Code §18.2-31(13).

Similarly, the provisions of Va. Code §19.2-294 are inapplicable to the allegations of Count II of the Indictment. Count II of the Indictment alleges the murder of Linda Franklin, her killing being the killing of more than one person in a three year period under Va. Code §18.2-31(8). While an act of terrorism under Va. Code §18.2-46.4 is not delineated in the body of Count II, the evidence adduced at trial will point to terrorism as the primary motive for the killing. The language

creating the exemption under Va. Code §19.2-294 was added in 2002. It appears from a plain reading of the statute that an actual charge of terrorism is not necessary to trigger the exemption; it is only necessary that the offense *involve* an act of terrorism.

An examination of Code §19.2-294 demonstrates the broad sweep of the exception it created. It provides in pertinent part as follows: “[T]he provisions of this section shall not apply to **any offense involving an act of terrorism as defined in Va. Code §18.2-46.4.** (emphasis added) In addition, Va. Code §18.2-46.4 further defines “Act[s] of terrorism as act[s] of violence as defined in clause (i) of Va. Code §19.2-297.1 committed with the intent to (i) intimidate the civilian population at large or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation.”

Here the crime of violence alleged in Count II, to wit; violation of Va. Code §18.2-31(8), is a crime of violence as defined by Va. Code §19.2-297.1 which applies to crimes under Va. Code §18.2-30 et seq. Furthermore, the evidence will demonstrate that this crime was committed with the requisite intent and for the specific purposes set forth in Va. Code §18.2-46.4. For these reasons, the provisions of Va. Code §19.2-294 are also inapplicable to the charge set forth in Count II of the Indictment.

**A violation of both a federal and state statute is not the “same act” if each statute requires proof of an element which the other does not.**

Malvo’s claim that this prosecution is barred by Va. Code §19.2-294 is untenable because the federal information did not constitute a prosecution for the “same acts” within the meaning of the statute. “[The] test of the identity of acts or

offenses is whether the same evidence is required to sustain them; if not, then the fact that several charges relate to, and grow out of, one transaction or occurrence does not make a single act or offense where two separate acts or offenses are defined by statute.” Hundley v. Commonwealth, 193 Va. 449, 451 (1952).

The assertion of a prior federal proceeding for the “same acts” as a bar to prosecution under Va. Code §19.2-294 amounts to a plea of former jeopardy. Epps v. Commonwealth, 216 Va. 150 (1975). The applicable test under these circumstances is whether each offense requires proof of an additional fact which the other does not; if proof of an additional fact is required, neither former jeopardy nor former Va. Code §19.2-259 (current Va. Code §19.2-294) is a bar to prosecution on the other offense. Id. at 154, 155.

In Epps, the defendant shot at an off-duty police officer named George Cipra during the course of a bank robbery. The bullet narrowly missed Cipra. Federal authorities charged the defendant with aggravated bank robbery and possession of stolen money. The warrant for aggravated bank robbery read in relevant part as follows:

“[the defendant] by force and violence and by intimidation, did take approximately \$34,000.00 in money belonging to... the First Virginia Bank of Nansemond, and... in committing the aforesaid offense, did put in jeopardy the life of George Cipra and others... by means and use of a dangerous weapon, that is, a pistol (18 U.S.C. § 2113(d).”

The jury acquitted the defendant on the charge of aggravated bank robbery and convicted him of possession of stolen money. Later, state authorities in Virginia charged the defendant with the attempted murder of Cipra based upon the same incident. At his state trial the defendant claimed that the Commonwealth was barred

from trying him on the attempted murder charge by Va. Code §19.2-259 (current Va. Code § 19.2-294).

The court in Epps held that neither Va. Code § 19.2 -259 (current Va. Code §19.2-294), nor constitutional double jeopardy, precluded the defendant's trial on the state charge of attempted murder. The court reasoned that the defendant had not committed the "same act" within the meaning of the statute because the offense of attempted murder required proof of intent to kill, whereas the federal offense of aggravated bank robbery did not. Moreover, the aggravated bank robbery charge required proof that the bank was federally insured; a fact superfluous to the charge of attempted murder. 216 Va. at 154.

Va. Code § 19.2-294 does not bar prosecution on state charges after the commencement of federal proceedings even where the Commonwealth relies upon evidence of federal crimes in order to show the defendant's intent with respect to the state charges. Billington v. Commonwealth, 13 Va. App. 341 (1987) (securities fraud both state and federal). The mere fact that two crimes are similar because they were committed by the same person "during a course of continuing intimidation of the same victim, [they] are not the 'same act' unless simultaneously committed." Jones v. Commonwealth, 218 Va. 757, 760. (theft of money and car during motel robbery).

**The Maryland Federal Information was not a prosecution under federal statutes for the "same acts" as alleged in the Indictment here, and thus does not bar this prosecution under Va. Code § 19.2-294**

A comparison of the allegations in the Federal Information with those contained in the Indictment in this case reveals that different acts and offenses are alleged in each. The Indictment in this case charges three counts of violations of

Virginia law. Count I alleges Malvo killed Linda Franklin in the course of an act of terrorism Va. Code §18.2-31(13). Count II alleges that Malvo killed Linda Franklin, and her killing constituted the killing of more than one person in a three year period Va. Code §18.2-31(8). Finally, Count III alleges Malvo used a firearm in the commission of the murder of Linda Franklin Va. Code §18.2-53.1. The federal information, on the other hand, conspicuously does not allege that Malvo committed any crime whatsoever involving Linda Franklin as the victim.

In six counts in the Federal Information, Malvo is alleged to have caused the death of specific individuals in violation of federal law. Linda Franklin is not among these victims. Moreover, none of the deceased victims named in the Federal Information is alleged to have been killed in the Commonwealth of Virginia much less in Fairfax County. In fact, the Federal Information does not allege a single crime against anyone that is alleged to have occurred in Fairfax County.

Simply stated, the Federal Information does not allege Malvo violated any federal statute involving the "same acts" as those at issue in this case, to wit; the murder, and use of a firearm in the commission of the murder of Linda Franklin. Therefore, Malvo's claim that Va. Code §19.2-294 precludes his prosecution because he now faces state charges for the "same acts" is baseless.

Additionally, each count in the Federal Information alleges a violation of federal statutes which require proof of additional and different facts than those required to sustain the charges in the Fairfax Indictment. The Federal Information alleges violations of the following statutes:

*18 U.S.C. § 1951* (Interference with commerce by threats or violence),  
*18 U.S.C. § 1952* (Interstate and foreign travel or transportation in aid of racketeering enterprises), *18 U.S.C. § 371* (Conspiracy to commit offense or to defraud the United States), *18 U.S.C. § 924 (j)* (Use of a firearm to cause the death of a person in furtherance of an act of

violence or drug trafficking), under 18 U.S.C. § 924 (c) (Penalty for use, carrying or possession of a firearm in crime of violence or drug trafficking), 18 U.S.C. § 922 (q) (3) (A) (Unlawful discharge of a firearm in a school zone)

It is hardly necessary here to engage in a detailed analysis of all of the elements of each of the foregoing offenses. Even a cursory inspection of these federal statutes reveals without a doubt that they each require proof of different facts than those required to prove the violations charged in the Fairfax Indictment. The following comparisons, for example, illustrate the absurdity of Malvo's position with respect to the application of Va. Code §19.2-294 to this case.

First, both 18 U.S.C. §§ 1951 and 1952 share the requirement of proof of some factual interstate nexus to the crime. In order to establish a violation of 18 U.S.C. § 1951 proof that the defendant obstructed or interfered with interstate commerce is required.

Interference with interstate commerce is not a fact necessary to the proof of the state charges in the instant case. The proof necessary to show a violation of 18 U.S.C. § 1952 includes the element of travel in interstate commerce in order to commit a crime of violence in furtherance of an unlawful activity. Again, interstate travel is not an element of the state charges in the present case.

The conduct proscribed by 18 U.S.C. § 371 is conspiracy to defraud, or otherwise commit an offense against the United States. Malvo is not charged with conspiracy or any inchoate crime in the case at bar.

The charge of 18 U.S.C. § 924(j) in the Federal Information alleges the use of a firearm in causing the death of Pascal Charlot. First, Malvo is not charged in this case with the murder of Mr. Charlot. Secondly, the crime of murder includes several elements that are not necessary to proof of the commission of the federal

crime alleged under 18 U.S.C. § 924(j), or any of the other federal crimes alleged in the Information.

Each of the counts in the Federal Information which charge a violation of 18 U.S.C. § 924(c) allege the death of a victim other than Linda Franklin. Furthermore, causing the death of a person under 18 U.S.C. § 924(c) is simply a different crime from the crime of murder under Va. Code § 18.2-31(8) which requires proof of the killing of more than one person in a three year period, as well as the familiar common law elements of premeditation, intent to kill and malice among others.

Finally, Malvo is not charged under with any state offense which even remotely resembles that alleged under 18 U.S.C. § 922 (q) (3) (A) which requires proof of the reckless discharge of a firearm within a school zone.

**The Defendant fails to cite any significant legal or factual basis in support of his contention that this prosecution is barred by Va. Code §19.2-294**

Malvo's reliance on Sigmon v. Commonwealth, 200 Va. 258 (1958) is misplaced. In Sigmon, the Commonwealth did not contest that the defendant was first charged in federal court with the *same offense* for which he was later tried in state court. Id. at 260 (illegal manufacture of distilled spirits). Therefore, the Court in Sigmon, merely decided the narrow issue of whether a federal *prosecution* or *proceeding* had begun. Id. at 268. Therefore, Sigmon provides no guidance or insight into the instant case where the question raised concerns the meaning of the term "same acts" in the context of Va. Code §19.2-294.

Owens v. Commonwealth, 129 Va. 757 (1921) simply holds that where state charges are obtained prior to the commencement of a federal prosecution for the same act, the state prosecution is not foreclosed by the statute. Again, the Court in Owens

was not called upon to decide whether the “same acts” were involved in both prosecutions so the case is not particularly relevant to the instant one.

Malvo erroneously ascribes particular weight and significance to Count 7 of the Federal Information in support of his claim of former jeopardy. It reads in relevant part as follows: On or about October 9, 2002 ... [Malvo] ... did travel in interstate commerce ...to the Commonwealth of Virginia with the intent to commit crimes of violence, to wit; murders.....and thereafter committed crimes of violence to further the unlawful activity,” (emphasis added).

Malvo claims that the crimes alleged under this count “include, *of course*, the murder alleged in the Fairfax Indictments.” It is a mystery how he can draw such a conclusion, particularly when the Fairfax Indictment charges the murder of Linda Franklin occurred on October 14, 2002 and not on October 9, 2002. In any event Malvo’s reasoning is seriously flawed.

Finally, Malvo surmises that perhaps Thomas DiBaggio, the U.S Attorney in Baltimore, was unaware when he obtained the Federal Information of the potential effects of Va. Code § 19.2-294 on a Virginia prosecution. Malvo is simply incorrect on this point. The Chief Law Enforcement Officer in Fairfax County, Commonwealth’s Attorney Robert F. Horan Jr. advised Mr. Dibaggio of the issue with respect to Va. Code § 19.2-294. Mr. Dibaggio then deliberately omitted the charges in this case from the Federal Information prepared by his office. He did so willingly and in the spirit of federal/state cooperation, and specifically for the purpose of not foreclosing Fairfax County as a potential jurisdiction for the prosecution of Malvo and Muhammad. At the time Mr. Dibaggio obtained the Federal Information against Malvo, the Attorney General of the United States, John Ashcroft, had not made his decision on where to best begin the prosecution of those accused of these



crimes.

**The provisions of Va. Code §19.2-294 only apply where two or more statutory offenses are involved.**

While the Federal Information charged Malvo with violation of federal statutes, under the Fairfax Indictment he is charged with two common law offenses, to wit; capital murder under Va. Code §§ 18.2-31(8) and 18.2-31(13). The provisions of Va. Code §19.2-294 simply do not apply unless two or more statutory offenses are involved. Weaver v. Commonwealth, 25 Va. App. 95 (1995), Darnell v. Commonwealth, 12 Va. App. 948,957 (1991) Martin v. Commonwealth, 242 Va. 1 (1991). In Weaver, the court held that defendant's prior acquittal on federal charges of conspiracy to commit murder and attempted murder of a witness under 18 U.S.C. §§ 371, 1512(a)(1)(A) did not bar his later state trial for the attempted murder of the same victim. 25 Va. App. at 101.

Virginia is a common law state. Carey v. Foster, 221 F. supp.185 (E.D. Va. 1963) (citing Newsome v. Fleming, 165 Va. 89 (1935)). The common law is in effect in Virginia except where abrogated by statute. (See Va. Code §1-10). The fact that the Code of Virginia sets the punishment for capital murder does not make it a statutory crime. The Code merely defines capital murder for sentencing purposes. Fitzgerald v. Commonwealth, 223 Va. 615 (1982). The elements of capital murder are defined by reference to the common law: they are not spelled out in the statute. Therefore capital murder is a common law offense and does not fall under the ambit of Va. Code § 19.2-294.

### Conclusion

The provisions of Va. Code §19.2-294 are inapplicable to the charges in this case in light of the 2002 Amendment which specifically exempted acts of terrorism from the reach of the statute. Moreover, the offenses charged in the federal information are not the "same acts" as alleged in the indictment in this case and therefore Va. Code §19.2-294 does not bar the prosecution of Malvo on the charges of capital murder and use of a firearm in the commission of murder in this case. A comparison of the allegations in the Federal Information with the charges in the Fairfax Indictment reveals an array of very different offenses requiring dissimilar factual proof in every instance. Malvo has therefore failed to meet his burden of showing former jeopardy in violation of Va. Code §19.2-294 in this case and the Commonwealth respectfully requests the Court to Deny his Motion to Dismiss this Indictment.

Respectfully submitted, \ \

RAYMOND F. MORROGH  
Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Response to Motion for Change of Venue was mailed, postage prepaid, to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151, and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221, this 23<sup>rd</sup> day of May, 2003. \ / 1

RAYMOND F. MORROGH  
Deputy's Commonwealth's Attorney